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FEDERAL COMMUNICATIONS COMMISSION
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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Implementation of Section 19 of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)

CS Docket No. 94-48

Annual Assessment of the Status)
of Competition in the Market for)
the Delivery of Video Programming)

REPLY COMMENTS OF LIBERTY CABLE COMPANY, INC.

ITS ATTORNEYS

Henry M. Rivera
Jay S. Newman
Ginsburg, Feldman & Bress
Chartered
Suite 800
1250 Connecticut Avenue, NW
Washington, DC 20036
202-637-9000

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SUMMARY

The overwhelming weight of the record in this proceeding is that the paramount goal of the Cable Television and Consumer Protection Act of 1992 -- competition in the video marketplace -- has not been attained. While commenters generally commend the efforts of the Commission and Congress to eliminate the significant obstacles to competition imposed by the entrenched cable monopolist, it is clear that cable companies continue to circumvent both the letter and the spirit of the law.

Not surprisingly, most cable operators take the position that there is robust competition in the video marketplace. The evidence which cable operators offer to support their position is minimal, consisting primarily of speculative predictions about future competition.

Some cable operators have attempted to distract the Commission from determining whether non-cable MVPD competition exists to cable operators by challenging the basic premises of the Commission's NOI and raising issues previously addressed by Congress. The Commission must ignore these diversions and focus on those issues which are critical to its analysis of the development of competition in the video marketplace including the need for expeditious processing of pending video dialtone applications; the prevention of predatory bulk rate discounts by cable operators; and, the elimination of obstacles which limit MVPD access to programming.

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REPLY COMMENTS OF LIBERTY CABLE COMPANY, INC.

Liberty Cable Company, Inc. ("Liberty"), by its attorneys, submits these Reply Comments in response to the Commission's Notice of Inquiry ("NOI") in the above-referenced proceeding.

I. The Status of Competition.

The overwhelming consensus of the comments filed by potential competitors to cable is that, despite Congress' adoption of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act"),^{1/} (i) significant obstacles to competition, imposed

^{1/} Pub. L. No. 102-385, 106 Stat. 1460 (1992).

by the entrenched cable monopolists,^{2/} remain and, (ii) no significant competition exists in the video marketplace.^{3/} While the comments of most of these potential competitors commend the efforts of Congress and the Commission to eradicate the anticompetitive behavior of certain cable operators, the comments are clear that Congress' goal of a competitive marketplace has not yet been realized because cable companies continue to circumvent the language and spirit of the law.^{4/}

^{2/} See, e.g., Comments of Bell Atlantic at p. 4 ("The plans of many municipalities to 'overbuild' the systems of cable incumbents have also failed to come to fruition. Some municipalities have been stymied by the delaying tactics of incumbent cable operators"); Comments of DirecTV, Inc. ("DirecTV") at p. 3 ("... [S]ome vertically integrated cable interests have continued to fight on numerous fronts -- in the marketplace, in the federal courts and at the FCC -- to stifle competition."); Comments of the National Rural Telecommunications Cooperative ("NRTC") at p. iii ("The major cable MSOs continue to thwart the competitive potential of HSD and DBS by ignoring the Program Access requirements").

^{3/} See, e.g., Comments of Bell Atlantic at p. 1 ("The unavoidable conclusion of the Commission's 1994 annual report to Congress must be that there is little evidence of increased competition in the local delivery of video programming since 1992. To the contrary, the delivery of video programming is becoming increasingly concentrated in the hands of a few large cable operators that face minimal local competition."); Comments of DirecTV at p. 3 ("Nevertheless, effective competition obviously is not yet here."); Comments of CellularVision of New York, L.P. at p. 3 ("In view of the gross lack of competition found in today's cable marketplace,"). However, the Wireless Cable Association International, Inc. ("WCA") has stated that there currently is competition in the video marketplace. This view might be explained by the fact that some WCA members are seeking investors in the capital markets and, therefore, have every incentive to portray the industry as being robust and competitive.

^{4/} Liberty agrees with DirecTV's observation that "[t]he overriding theme ... is that the 1992 Cable Act, and the Commission's implementing rules and decisions, while of enormous help to non-cable MVPDs, have not yet finished their job. The cable industry keeps finding creative ways to adapt to and influence the development of emerging competition". Comments of DirecTV at p. 21.

Not surprisingly, the comments of most cable operators reflect a view that significant competition currently exists in the video marketplace. However, the evidence which cable operators offer to support this view is minimal, and only "speculative" predictions of competition in the future are offered.^{5/}

Other claims made by cable operators (which are intended to illustrate the current competitiveness of the marketplace) are deceptively inaccurate. For example, Time Warner asserts that "of course, virtually any [Time Warner] subscriber could elect to obtain video programming via ... SMATV ... within numerous areas served by [Time Warner]".^{6/} What Time Warner fails to mention is the fact that potential SMATV subscribers must overcome significant barriers before they can switch to a SMATV service provider.^{7/} For example, Time Warner is simply uncooperative in doing its disconnections in coordination with Liberty's installations. Indeed, the burdens imposed on potential subscribers (who are considering a

^{5/} See, e.g., Comments of Tele-Communications, Inc. ("TCI") at p. 8 ("There are approximately 500,000 MMDS subscribers, and independent parties forecast that this number will rise eightfold by the end of the decade". [Emphasis added.]); Comments of the National Cable Television Association, Inc. ("NCTA") at p. 9 ("While video dialtone offers the potential for increased competition in the video marketplace,"); NCTA at p. 10 ("Within the next five to six years, one industry consultant estimated, 'the wireless cable industry will be serving more than 4 million subscribers'" [Emphasis added and footnote omitted.]); NCTA at p. 11 ("In New York, wireless competitors, overbuilders, telephone and SMATV operators are hoping to penetrate 30 to 40 percent of cable's 1.8 million area households". [Emphasis added.]); Comments of Home Box Office at p. 4 ("... and all indications suggest that [the growth of wireless cable] will continue into the future".).

^{6/} Comments of Time Warner at p. 18.

^{7/} See Comments of Liberty at pp. 16-18.

switch) are often so great that many decide to forego Liberty's lower priced service solely because of the aggravation Time Warner creates.

II. In an Effort to Distract the Commission from Determining Whether Non-cable Multichannel Video Programming Distributor ("MVPD") Competition Exists in the Video Marketplace, Some Cable Operators have Inappropriately Questioned the Basic Premises of the NOI and Raised Issues Unrelated to the NOI.

Certain cable operators which filed comments in this proceeding have challenged the basic premises of the Commission's NOI, apparently, in an effort to distract the Commission from one of its objectives -- to determine whether non-cable MVPD competition exists to cable operators. Specifically, Time Warner argues that the relevant market which the Commission should be studying in the NOI should include all sources of information and entertainment -- MVPD and non-MVPD (e.g., radio, the print media, movie theaters, etc.) -- which could be viewed as being an alternative to cable. Time Warner believes if the Commission limits its competitive analysis to that afforded by MVPDs, the amount of competition to cable operators will be understated.

Time Warner's Comments regarding what should constitute the relevant market are both irrelevant and misdirected. First, Time Warner's Comments are of limited relevancy to the Commission as it formulates communications policy based on the parameters established by Congress. Virtually all of the cases and analysis offered by Time Warner in its comments on this subject appear to

have a distinct antitrust bent^{8/} and are more relevant to an anti-trust analysis conducted by the Department of Justice rather than a communications policy analysis conducted by the Commission. Second, Time Warner's Comments in this proceeding are inappropriately directed to the Commission. The Commission did not define the relevant product market; rather, it is merely implementing the statute which defined the product market. Time Warner's concerns about what constitutes the relevant product market should have been made to Congress when it was adopting the statute.^{9/}

Liberty believes that Congress correctly decided to limit the relevant product market to products provided by MVPDs. Congress was primarily concerned with promoting competition to cable operators by MVPDs. Congress hoped that promoting MVPD competition to traditional cable would result in higher quality and lower priced video services for consumers.^{10/} Those cable operators that are

^{8/} See Comments of Time Warner at pp. 2-16. See, e.g., Comments of Time Warner at pp. 2-3 ("Competition between products is a matter of how different in character and use the products may be and the extent to which buyers find products to be reasonably interchangeable or substitutes."); Comments of Time Warner at footnote 3 ("To determine interchangeability, a court must analyze the cross-elasticity of demand between two products, that is, the extent to which sales of one product are responsive to price changes of another.").

^{9/} See U.S.C. § 623(1)(1) where Congress defined "effective competition" in terms of MVPDs without reference to non-MVPDs. Indeed, Time Warner appears to concede the tenuous nature of its position when it states that "We recognize of course that Congress has defined 'effective competition' in the 1992 Cable Act and done so without regard to the presence of non-multichannel delivery systems," Comments of Time Warner at footnote 16.

^{10/} See S. Rep. No. 92, 102d Cong. at 1 (1992) ("The purpose of this legislation is to promote competition in the multichannel video marketplace and to provide protection for consumers against monopoly rates and poor customer service.").

attempting to expand the scope of the relevant product market seek only to distort the conclusions and concerns of Congress, the Commission and potential competitors. The Commission has acted properly and should not modify its approach to the relevant product market.

It is noteworthy that some comments have complained that the NOI "wrongly presupposes" that widespread and debilitating anticompetitive behavior exists in the video marketplace and that the Commission has ignored the "benefits" of vertical integration.^{11/} Neither of these allegations are accurate. It has been well documented in this, and other Commission proceedings over the years, that there are substantial anticompetitive practices being implemented against cable competitors by vertically integrated multiple system operators ("MSOs")^{12/}. Furthermore, the Commission's regulations have not ignored the benefits of vertical integration. Rather, the Commission's regulations are an attempt to curb the abuses of vertical integration, as Congress intended.^{13/}

Cable operators have also used this proceeding as a forum to raise issues previously addressed by Congress. For example, TCI argues that the Commission should urge Congress to revise the Act's

^{11/} See Comments of Time Warner at pp. 29-36.

^{12/} See, e.g., Comments and Reply Comments of various competing MVPDs (including Liberty) in the following Commission proceedings: Cable Home Wiring (MM Docket No. 92-260 and RM 8380); Cable Programming Access (MM Docket NO. 92-265); and, Cable Rate Regulation (MM Docket No. 92-266).

^{13/} See S. Rep. No. 92, 102d Cong. at 28 ("[The program access provisions are] limited to vertically integrated companies because the incentive to favor cable over other technologies is most evident with them.").

50-15 effective competition test primarily because the use of this test, according to TCI, is not an appropriate gauge of competition in the video marketplace. In adopting this standard, Congress recognized that the existence of viable multichannel video competitors was necessary to ensure effective competition to cable operators.^{14/} Congress' reasons for adopting this standard are still valid today and, therefore, Congress should not change the standard.

In sum, it is imperative that the Commission not be distracted by the efforts of certain commenters to obscure the issues relevant to the NOI. The Commission must ignore these red herrings and continue to focus on the status of competition between non-cable MVPDs and cable operators.

III. Specific Issues.

A. Video Dialtone.

Numerous commenters discussed the viability of video dialtone ("VDT") as an alternative to traditional cable. Telephone companies and others understandably questioned the efficacy of the Commission's Section 214 VDT application process which has delayed the introduction of commercial VDT service.^{15/} Cable operators emphasized VDT's potential as an alternative to cable^{16/} while

^{14/} See House Conf. Rep. No. 862, 102d Cong. at 49; S. Rep. No. 92, 102d Cong. at 12.

^{15/} See Comments of Bell Atlantic; Comments of Bell South; Comments of US West; Comments of NYNEX; Comments of Liberty.

^{16/} See Comments of NCTA at pp. 6-9; Comments of TCI at pp. 10-11.

simultaneously urging the Commission to further decelerate the VDT authorization process.^{17/}

Significantly, on July 6, 1994 (a week after Comments in this proceeding were filed), the Commission granted the first application for commercial video dialtone service to New Jersey Bell Telephone Company ("NJB").^{18/} As a result, NJB will construct and operate a video dialtone system to serve approximately 38,000 homes in Dover Township, NJ. Liberty applauds the Commission's efforts to bring VDT service to consumers and urges the Commission to continue to process the pending VDT applications as expeditiously as possible.

The Commission must continue to guard against cable operators' efforts to retard the introduction of VDT. The cable industry's repeated attempts to block the VDT applications of NJB and others illustrate this type of behavior.

B. Uniform Rates.

In its Comments, Liberty describes how Time Warner continues to circumvent both the intent and the terms of the uniform rate requirement by only effectively offering bulk rates to those multiple dwelling units ("MDUs") considering switching to Liberty's

^{17/} See Comments of NCTA at p. 9.

^{18/} In the Matter of the Application of New Jersey Bell Telephone Company for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Construct, Operate, Own and Maintain Advanced Fiber Optic Facilities and Equipment to Provide Video Dialtone Service within a Geographically Defined Area in Dover Township, Ocean County, New Jersey, Order and Authorization, File No. W-P-C-6840 (released July 18, 1994).

service.^{19/} Liberty believes that the selective offering of reduced rates by its competitors is not cost justified but is, rather, predatory pricing.

It is noteworthy that Time Warner raises its own concerns about the uniform rate requirement. Specifically, Time Warner argues that its ability to compete with MVPDs has been hindered by the Commission's recent interpretation of the uniform rate provisions of the Act. In this regard, the Commission has interpreted the uniform rate provision of the Act to mean that a cable operator must have a uniform rate structure within each franchise area, including those areas where effective competition exists.^{20/} The Commission correctly concluded that "[t]he specific harms that the rate uniformity provision is intended to prevent -- charging different subscribers different rates with no economic justification and unfairly undercutting competitors' prices -- could occur in areas with head-to-head competition or low penetration sufficient to meet the Act's definition of 'effective competition'".^{21/} Indeed, as the record in the rate proceeding demonstrates, if the uniform rate requirement were not interpreted in this manner, nothing would prevent cable operators from dropping their rates in one part of their cable franchise area to undercut a competitor temporarily in order to drive that competitor out of the market.

^{19/} See Comments of Liberty at pp. 9-11.

^{20/} See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation, Third Order on Reconsideration, MM Docket No. 92-266 (released March 30, 1994).

^{21/} Id. at ¶ 24.

Time Warner also asserts that the Commission's interpretation of the uniform rate requirement prohibits cable operators from "offering non-predatory bulk account discounts" to MDUs. This statement is patently wrong. The uniform rate requirement is designed to prevent predatory bulk discounts. Indeed, the Commission's regulations permit cable operators to offer different rates (i.e., different bulk rates) as long as the cable operator can demonstrate that its cost savings vary with the size of the building and the duration of the contract, and as long as the same rate is offered to buildings of the same size and contracts of similar duration.^{22/}

C. Program Access Rules.

In its Comments, Liberty provides specific examples of how restricted access to programming (both vertically and non-vertically integrated) has frustrated competition in the video marketplace.^{23/} Liberty agrees with DirecTV's observation that the Act and the Commission's program access rules broke the "logjam" of obtaining programming from vertically integrated programmers. But, Liberty also shares DirecTV's concern that cable operators will circumvent these laws and utilize "new strategies and campaigns to control and limit the development of emerging competition".^{24/} While Liberty appreciates the Commission's

^{22/} 47 C.F.R. § 76.984(b).

^{23/} See Comments of Liberty at pp. 11-16 which discusses, among other things, Liberty's experiences with Court TV and New York One.

^{24/} Comments of DirecTV at p. 21.

efforts to liberate Court TV from its exclusivity agreement with Time Warner, Liberty remains wary that other MSOs will continue in their efforts to limit MVPD access to other programming. Thus, the Commission must, today, carefully monitor the cable industry's proclivity towards restricting access to programming and be alert for new types of anticompetitive behavior if there is any chance for competition to thrive in the future.

WCA also discusses the importance of the program access rules and raises a significant limitation of the Act. In its Comments, WCA references TCI's efforts to extract cable exclusivity from Fox Broadcasting Network for its new programming service, FX, to illustrate the market power of entrenched wired systems and the need for Congress to amend Section 628 of the Communications Act of 1934.^{25/} Specifically, WCA argues that Section 628 be amended to extend to all programmers, regardless of whether they are vertically integrated.^{26/}

Liberty supports WCA's proposition to amend Section 628. Liberty also believes that it is imperative that Congress clarify an ambiguity in the Act and make it clear that Section 628 provides MVPDs with program access relief regardless of whether the program-

^{25/} See Comments of WCA at pp. 14-15.

^{26/} Among other things, Section 628 requires the Commission to adopt regulations which "establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor".

ming is satellite delivered.^{27/} As major cable operators reconfigure their systems and escalate their deployment of fiber optic networks, satellites will become an increasingly inefficient means to deliver video signals. Therefore, if competing MVPDs are to obtain program access relief, the Commission should recommend to Congress that the scope of Section 628 be clarified and, if necessary, Section 628 be amended so as not to distinguish between programming delivered by satellite and programming delivered by other means such as cable.

D. Definition of "Cable System".

Time Warner questions the Commission's 1990 interpretation of what constitutes a "cable system" and describes how this has adversely affected its ability to compete.^{28/} Specifically, Time Warner challenges the Commission's interpretation of the definition of "cable system" which provides that SMATV systems connecting buildings by microwave or other wireless means are not cable systems. By rehashing arguments (most of which the Commission has already considered and rejected) on an issue which is, at best, tangential to the NOI, Time Warner again seems to be trying to distract the Commission from its primary objectives in this proceeding. Time Warner's comments on this subject should be disregarded.

^{27/} See Comments of Liberty at pg. 14.

^{28/} See In re Definition of a Cable Television System, 5 FCC Rcd 7638 (1990).

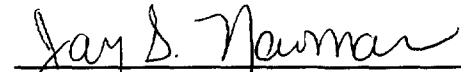
WHEREFORE, based on the foregoing, Liberty respectfully requests that the Commission take action in this proceeding consistent with the views expressed in Liberty's Comments and Reply Comments filed in this proceeding. The Commission must ensure that, among other things, alternate providers have access to programming and property (i.e., existing cable home wiring) and must protect alternate providers from predatory pricing. If the Commission fails to take these steps today, competition will not exist in the future.

Respectfully submitted,

LIBERTY CABLE COMPANY, INC.

**GINSBURG, FELDMAN AND BRESS
CHARTERED, ITS ATTORNEYS**

By:


Henry M. Rivera
Jay S. Newman
Suite 800
1250 Connecticut Avenue, NW
Washington, DC 20036
202-637-9000

Dated: July 29, 1994